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# Trial Delay Indemnity - Insuring Our Criminal Justice Machinery

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# TRIAL DELAY INDEMNITY—INSURING OUR CRIMINAL JUSTICE MACHINERY

## I. Historical Background

Of the eighteenth century critics of French criminal procedure, Voltaire was perhaps the most caustic.[1] Victimized by a grossly unfair criminal justice system, he frequently struck out venomously at the government which acquiesced in the system's inequities and misdealings.[2] But Voltaire's aim was not merely the wholesale discrediting of the justice system. His views were often thoroughly constructive, particularly where the rights of the innocent accused were concerned.

One of Voltaire's principal contentions was that the State was morally obligated to compensate, monetarily, innocent victims of criminal justice.[3] On one occasion, in referring to French criminal procedure in general, but in particular to the much maligned Criminal Ordinance of 1670, he queried, "Should it not be as favorable to the innocent as it is terrible to the guilty?"[4] Not until 1766 did this rhetorical question elicit a decisive, affirmative response. It was in that year that Frederick the Great of Prussia, a long-time admirer of Voltaire's compensation theories, signed into law an act authorizing payment by the State of a just indemnity to persons arrested, detained or released, and subsequently found innocent.[5]

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1 Montesquieu and Beccaria were also outspoken in the area of criminal procedure reform. Montesquieu kept to general ideas, favoring fixed laws that left nothing to the discretion of the judge. Beccaria, though concerned with the details of reform (*i.e.*, the necessity for fixed punishments, abolishment of secret accusations and torture, etc.) was not particularly daring in his demands. A. ESMEIN, HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 362-64 (1968).

2 Between 1716 and 1726 Voltaire was twice imprisoned in the Bastille. He was first incarcerated for having written verses against King Philippe d'Orleans, and the second occasion was the result of a quarrel with a dissolute young nobleman, the Chevalier de Rohan. A. NOYES, VOLTAIRE 43, 88 (1936).

That Voltaire was not one to mince words in decrying the irresponsibility of his government in regard to criminal justice is illustrated vividly by these remarks:

> . . . But, I ask, is not the extreme rigor of your criminal practice, the cause of his disobedience? A man is accused of a crime, you proceed to immure him immediately in a frightful dungeon; you suffer no one to have communication with him; he is loaded with fetters as if already convicted. The witnesses who testify against him are examined in secret and in his absence. . . . And, if circumstances admitted by the accused when interrogated, be differently related by the witness, that alone will be sufficient grounds for ignorant or prejudiced judges to condemn an innocent man.

Voltaire in a commentary on BECCARIA, *Essay on Crimes and Punishments* 233-34 (Reprint 1953).

3 In the same commentary Voltaire noted that:

> [I]n France, an innocent man who has been immured in a dungeon, who has undergone torture, has no consolation . . . to hope for, no one to look to for damages; and he returns to society with a ruined reputation.

*Id.* at 229.

4 VOLTAIRE, *Commentaire du Traité des délits et des peines,* ch. XXIII as cited in A. ESMEIN, *supra* note 1, at 365.

5 The act, Neue Verordnung um die Prozesse zu Kürzen § 9 (1766), reads as follows:

> If a person suspected of a crime has been detained for trial, and where . . . he has been released from custody, and in the course of time his complete innocence is established, he shall not only have complete costs restored to him, but also a sum of money as just indemnity to all circumstances of the case payable from the funds of

Although Prussia was the first of the European countries to give statutory recognition to the theory of compensating acquitted individuals for pretrial injustice, many other European states were soon to follow in her legislative footsteps. By 1932 twelve European countries or municipalities, including Sweden, Norway, Denmark and Germany, had enacted laws to compensate innocent detainees.[6] As of 1969, Portugal and Greece had been added to the list.[7]

While the legislative action of our European neighbors in the field of indemnification has been quite innovative and indeed commendable, it is highly improbable that their system of compensation for pretrial injustice would fit properly into our constitutional mold. A modification of it, however, might very well be adaptable.

Under the United States Constitution, the basis for a valid arrest is probable cause.[8] Once arrested, a defendant is entitled to a reasonably speedy trial.[9] Considering this joint premise, it is submitted that blanket adoption of the European rule of compensating *every* legally arrested but subsequently acquitted individual would possibly have a corrosive effect on the probable cause basis for arrest. Predictably, such rule would encourage slipshod probable cause determinations by police and magistrates, since the temptation would be great for these officials to adopt a "no harm" rationale; that is, the incentive for scrutinizing the basis for probable cause would wane since the accused would *always*

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the trial court, so that the innocent person may be compensated for the injuries he has suffered.

E. BORCHARD, CONVICTING THE INNOCENT 381 (1932).

6 *Id.* at 387. Other countries and municipalities compensating innocent detainees as of 1932 were Hungary, Holland, Berne, Freiburg, Neuchatel, Basel, and Tessin. Countries which passed laws granting an indemnity only for unjust or erroneous conviction included France, Italy, Belgium, Portugal, Brazil, and Spain. *Id.*

In regard to England, Samuel Romilly—largely influenced by the theories of Jeremy Bentham—introduced a bill in Parliament in 1808 providing compensation for erroneously convicted persons. Although the bill was eventually withdrawn, it should be noted that England on several occasions has compensated erroneously convicted persons by acts of Parliament. *Id.* at 383.

7 G. MUELLER & F. LE POOLE-GRIFFITHS, COMPARATIVE CRIMINAL PROCEDURE 104 (1969). It is worthy of note that the European Convention on Human Rights and the United Nations Draft Covenant on Civil and Political Rights both contain provisions granting an innocent victim of pretrial detention an enforceable right to compensation against the State. *Id.*

8 U.S. CONST. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and *no Warrants shall issue, but upon probable cause,* supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (Emphasis supplied.)

For cases interpreting the probable cause requirement of the fourth amendment see Draper v. United States, 358 U.S. 307 (1959); Beck v. Ohio, 379 U.S. 89 (1964); Bailey v. United States, 389 F.2d 305 (D.C. Cir. 1967).

9 U.S. CONST. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the *right to a speedy and public trial,* by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence. (Emphasis supplied.)

For cases defining the limits of the speedy trial right see: Beavers v. Haubert, 198 U.S. 77 (1905); Pollard v. United States, 352 U.S. 354 (1957); Smith v. United States, 360 U.S. 1 (1959); United States v. Ewell, 383 U.S. 116 (1966); Klopfer v. North Carolina, 386 U.S. 213 (1967); Smith v. Hooey, 393 U.S. 374 (1969); Dickey v. Florida, 398 U.S. 30 (1970); United States v. Marion, 404 U.S. 307 (1971); Barker v. Wingo, 407 U.S. 514 (1972).

be entitled to monetary compensation if the determination lacked adequate support.

Clearly, the better plan for the United States would be to retain stringent guidelines for the determination of probable cause, and then to permit justice to run its course in an orderly, expeditious manner after arrest.[10] The right to compensation would thus arise specifically in the instance where the government's delay in conducting an "orderly and expeditious" prosecution against a later acquitted or dismissed individual exceeded all limits of reasonableness. Hence, the modification necessary for bringing the European paradigm within the bounds of our constitutional framework would be a preestablished reasonable time limit for prosecutions—a de minimis standard. With the adoption of such modification, if the acquitted defendant's trial were delayed by the State beyond this reasonable time frame, the defendant—provided that he met certain other qualifications—would be eligible to bring a claim for indemnity against the State; hence the theory of trial delay indemnity.

In the paragraphs which follow, the purpose, justification, and practicality of adopting a trial delay indemnity system in the United States will be examined. Several public compensation statutes already in existence will be analyzed together with United States Supreme Court decisions relating to trial delay in order to insure an eclectic approach, and to provide background information to assist in the difficult task of designing meaningful legislation.

## II. Purpose

Mr. Edwin Borchard, former Professor of Law at Yale University and perennial advocate of compensation for innocent victims of criminal justice, once remarked:

> . . . Were it not for historical reasons, it would seem strange that the protection of the individual against official wrongs should, so far as concerns indemnity, have been so long neglected . . . . *[E]xceptional losses due to the imperfections of administration should not be permitted to rest where they fall, but should be distributed over the group as a whole.*[11] (Emphasis supplied.)

Mr. Borchard's comment neatly identifies the principal objective of a trial delay indemnity scheme. Primarily, it would right official wrongs—that is, provide direct compensation for innocent individuals suffering damages due to State-caused trial delay. Society, in effect, would be insuring its criminal justice system against mishap or malfunction. But even aside from its principal purpose, it might serve additional useful functions. For example, it could serve as a check on court administrative efficiency, particularly in the near future when computer programming methods and trained court administrators become commonplace in our judicial system.[12] Indemnity paid to innocent defendants would provide

10 *See* Smith v. United States, 360 U.S. 1, 10 (1959), in which the Supreme Court stated, "While justice should be administered with dispatch, the essential ingredient is orderly expedition and not mere speed."

11 E. BORCHARD, *supra* note 5, at 376.

12 This day may approach sooner than we might be inclined to predict. The city of

a device for gauging the relative efficiency of both the administrator and the prosecutor. A "clean slate" at the conclusion of a particular year would indicate topflight efficiency and perhaps merit recognition in the form of a bonus. On the other hand, a deluge of claims for indemnity would possibly indicate inattentiveness on the part of the administrator or incompetence on the part of the prosecutor, either of which might suggest the need for a replacement.

## III. Justification

It seems logical that a trial delay indemnity scheme should be commended to legislators for consideration only upon a finding that certain conditions exist: (1) that substantial delay occurs in the conduct of criminal trials; (2) that a significant number of defendants are subsequently acquitted or dismissed; and (3) that individuals so acquitted or dismissed suffer actual damages. There is much evidence to suggest that all three of these conditions currently prevail.

### A. *Existence of Delay*

In 1970 Chief Justice Burger, lamenting the deplorable amount of delay in processing federal criminal cases, noted with concern that in the past few years in all district courts, the time lapse from indictment to sentence had more than doubled.[13] Recent statistics tend to indicate that delay of criminal trials is equally critical at the state and city court levels. For example, in Passaic and

Denver has used a computer effectively for preliminary scheduling of criminal cases since 1967, and such use of computer techniques for criminal docket control has been publicly commended by prominent judicial figures, including Chief Justice Burger. *See* ABA COMM. ON ELECTRONIC DATA RETRIEVAL, COMPUTERS AND THE LAW 71 (1966); Navarro & Taylor, *An Application of Systems Analysis to Aid in the Efficient Administration of Justice,* 51 J. AM. JUD. SOC'Y 47 (1967); *Forward March! In Judicial Administration,* 57 A.B.A.J. 860 (1971).

Other innovations helping to bring about improved standards in judicial administration include the Court Executives Act, 28 U.S.C. § 332(e) (1970) authorizing an executive officer for each of the eleven federal circuits, the establishment of the National Center for State Courts, the creation of the Institute for Court Management at the University of Denver, and the institution of state-federal judicial councils in forty of the fifty states. *Forward March! In Judicial Administration, supra;* Burger, *The State of the Federal Judiciary,* 57 A.B.A.J. 855 (1971).

13 Burger, *State of the Judiciary,* 56 A.B.A.J. 929, 930 (1970). Evidence presented before a United States Senate subcommittee indicated that in 1968, the median time interval for processing a criminal case (from filing of indictment to final disposition) exceeded six months in nine federal districts. *Hearings on S. 952 and Related Bills Before the Subcomm. on Improvements in Judicial Machinery of the Senate Committee on the Judiciary,* 91st Cong., 1st Sess. 513-15 (1969). A breakdown of figures on median time intervals from filing to disposition of criminal defendants in Federal District Courts for the years 1967-68 is as follows:

| Court | Total | | Dismissed | | Guilty Plea | | Court Trial | | Jury Trial | |
|---|---|---|---|---|---|---|---|---|---|---|
| | No. | Mos. | No. | Mos. | No. | Mos. | No. | Mos. | No. | Mos. |
| '68 Dist. of Columbia | 1,892 | 9.5 | 282 | 10.4 | 896 | 8.8 | 120 | 9.1 | 594 | 10.1 |
| '67 | 1,011 | 7.8 | 149 | 8.4 | 444 | 5.5 | 67 | 8.9 | 351 | 10.1 |
| '68 Other 89 Courts | 31,843 | 2.9 | 4,981 | 7.5 | 22,055 | 2.2 | 1,668 | 4.6 | 3,139 | 5.8 |
| '67 | 31,535 | 2.5 | 4,196 | 7.3 | 23,131 | 1.9 | 1,449 | 3.9 | 2,759 | 5.7 |

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 269 (1968), 269 (1967).

Essex counties, New Jersey, during 1965, median times in felony cases from accusation to trial were approximately 13 and 12 months, respectively.[14] Further, the results of a trial delay study published in 1972 indicated that the average arrest-to-trial interval for jailed defendants in one county in Indiana was more than twice the interval recommended by the President's Commission on Law Enforcement and Administration of Justice. The same interval for *bailed* defendants in another county in that state was more than four times the suggested limit.[15] As for city courts, a 1967 survey showed that in the Recorder's Court of the city of Detroit, eighteen per cent of the felony defendants incarcerated prior to trial were detained in excess of 90 days.[16] While a comprehensive analysis of criminal trial delay statistics on a nationwide basis is beyond the scope of this discussion, the data presented above indicates to a reasonable degree of conclusiveness that delays in criminal trials are prevalent at all government levels.

### B. *Acquitted Defendants*

That a significant number of arrested persons are subsequently acquitted, or their cases dismissed, is also a well-documented fact. The *Uniform Crime Reports for the United States* published by the F.B.I. for the years 1968 and 1970 offer an enlightening comparison. The consolidated chart on the following page, based upon a survey of over 2,500 cities, indicates that as the incidence of several categories of felonies increased, so too did the percentage of acquittals and dismissals.[17]

14 U.S. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 80 (1967) [hereinafter cited as TASK FORCE REPORT: COURTS].

15 Statistics on average arrest-to-trial intervals recorded by the Notre Dame University joint law school-engineering school study are as follows:

| | Jailed Defendants | Bailed Defendants |
|---|---|---|
| St. Joseph County | 144 days | 333 days |
| Marion County | 165 days | 295 days |

2 SYSTEMS STUDY IN COURT DELAY (LEADICS) 102 (1972).

The President's Commission on Law Enforcement has suggested that a reasonable arrest-to-trial interval for most felony cases would be approximately 70 days. TASK FORCE REPORT: COURTS, *supra* note 14, at 86-87. In contrast, rarely in the past has an innocent person in England subjected to an arrest-to-trial interval in excess of 50 days. E. GIBSON, TIME SPENT AWAITING TRIAL 9 (Table 6) (London 1960).

16 TASK FORCE REPORT: COURTS, *supra* note 14, at 136.

17 The data appearing in this chart was compiled from the UNIFORM CRIME REPORTS FOR THE UNITED STATES 105 (1968) and 114 (1970). With regard to the number of acquittals and dismissals occurring at the Federal District Court level alone during 1967 and 1968, the ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 260, 263 (1967) and 261, 263 (1968) provides the following illuminating statistics:

| Court | | Total Defendants | Not Convicted | | | |
|---|---|---|---|---|---|---|
| | | | Total | Dismissed | Acquitted by Court | Acquitted by Jury |
| Dist. of Columbia | '68 | 1,892 | 514 | 282 | 93 | 139 |
| | '67 | 1,011 | 282 | 149 | 57 | 76 |
| Other 89 Courts | '68 | 31,843 | 6,169 | 4,981 | 484 | 704 |
| | '67 | 31,535 | 5,191 | 4,196 | 409 | 586 |

| Disposition of Persons Formally Charged by Police in 1968 and 1970 | | | | |
|---|---|---|---|---|
| Offense | No. Charged | | % Acquitted or Dismissed | |
| | 1968 | 1970 | 1968 | 1970 |
| Manslaughter by Negligence | 923 | 961 | 41.6 | 42.2 |
| Forcible Rape | 3,910 | 4,915 | 33.1 | 34.8 |
| Robbery | 19,152 | 23,320 | 20.3 | 23.6 |
| Aggr. Assault | 35,226 | 38,466 | 29.4 | 31.1 |
| Larceny-Theft | 195,672 | 236,495 | 13.8 | 14.5 |

Many factors may have combined to account for the increased percentage of acquittals and dismissals, to wit: enlarged police forces, population and density variations within the cities, variation in the number or type of cities surveyed, etc., but the actual acquittal and dismissal percentages, in themselves, are sobering.

Another government report concerned with the administration of federal criminal justice contained information to the effect that in the Northern District of California for one fiscal year alone, of the number of cases in which bail could not be raised, as many as five acquittals resulted.[18] Results of still another report pertaining to court administration in a large metropolitan area indicated that of the 20,193 cases which were processed, as many as 2,512 defendants were not convicted (1,467 were found not guilty and charges were dismissed in the other 1,045 cases).[19]

In many instances a defendant is acquitted simply because the police apprehend the wrong person. One reason for this is human error—especially on the part of eyewitnesses. For instance, an analysis of testimony of 20,000 persons who were asked to describe the physical characteristics of the man they saw commit a crime revealed that, on the average, they overestimated the height by five inches, the age by eight years, and gave the wrong hair color in 82 per cent of the cases.[20]

18 REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 142 (1963). Although on its face this fact does not appear earth-shattering, its true force becomes apparent when one considers that serious injustice occurs even if only *one* defendant is acquitted after being unable to raise bail. The Federal Bail Reform Act, 18 U.S.C. § 3146 (1966), has attempted to eliminate the pretrial confinement of an indigent defendant solely on the grounds of his inability to raise bail by authorizing liberal release on recognizance in noncapital cases without conventional bail bond. Under the Act, accused persons may be detained if the judge finds that no one or more conditions for pretrial release will reasonably assure that the person will not flee or pose a danger to any other person in the community. It should be observed, however, that while the *federally* charged indigent defendant is covered by the Act, the umbrella of protection has not yet been extended by the majority of states to defendants charged with *state* offenses.

19 TASK FORCE REPORT: COURTS, *supra* note 14, at 130.

20 J. FRANK, NOT GUILTY 61 (1957). *See also* E. Borchard's work, *supra* note 5, in which the author catalogues 65 criminal prosecutions where the defendant was erroneously convicted,

The combined force of these facts compels the conclusion that there is a significant number of persons arrested today who may be completely innocent of the crime of which they are charged or who may have been arrested and charged without probable cause.

### C. *Damages Incurred*

There are literally hundreds of cases in which trial delay has inflicted arbitrary cruelty. For example, in one instance a man was jailed on a serious charge on Christmas Eve. Since he could not afford bail, he was compelled to spend 101 days in jail before being brought to a hearing. At the hearing, the complainant admitted that the charge was false. In another case, a man spent two months in jail and thereafter was acquitted at his trial. During that two-month period, he lost his job, his car, and his family ties were broken. He was unable to find another job for four months.[21] These are just two of the many examples in which persons have suffered both pecuniary and nonpecuniary injuries at the hands of a criminal justice system which currently provides no adequate means by which an injured person may be made whole again. The problem is perhaps most acute where indigent defendants are involved.

In 1970 the United States Commission on Civil Rights under the direction of Reverend Theodore Hesburgh, C.S.C., issued a controversial eye-widening report which cast grave doubts as to whether Mexican Americans were being granted *any* of their pretrial constitutional rights—much less their prompt trial right.[22] As the report disclosed, part of the problem stems from the fact that Mexican Americans, a predominantly migrant people, constitute a concentrated, not yet fully assimilated, ethnic group, a substantial number of whom are relatively poor, uneducated, and significantly impeded by a formidable language barrier.[23] When they come in contact with the criminal justice system and require the assistance of an attorney, they almost invariably qualify financially for State-appointed counsel. According to the report, it is at *this* point that their troubles may just begin. Either they are encouraged by their appointed counsel to enter guilty pleas—thereby accelerating the criminal process, or, because their appointed counsel is overburdened with other work or is lacking in experience in the criminal area, they are simply forgotten—thereby protracting the

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the tragic error being attributed to misidentification of the accused by the victim of the crime of violence. *Id.* at xiii.

As an interesting sidelight, a lawyer who conducted a prison study in the states of New Jersey and Pennsylvania reported that of the 146 prisoners interviewed, 23 percent claimed complete innocence of the crime for which they were serving. The mean average number of days the New Jersey group had spent in jail pending trial was 81.71—considerably in excess of the de minimis figure recommended by the President's Commission. A. TREBACH, THE RATIONING OF JUSTICE 248, 263 (1964).

21 This example and the one preceding were reported in 2 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 819 (June 27, 1966).

22 REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS: MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST (1970).

23 The Mexican Americans living in Arizona, California, Colorado, and Texas constitute the largest minority group in that part of the United States—approximately 4,000,000 people. In Texas alone, of the 1,426,358 Spanish surnamed population, 13.6 percent have an annual income of less than $1,000. *Id.* at x. The educational statistics appearing in the chart on the next page are, at best, extremely discomforting.

process.[24] A trial delay indemnity system could conceivably assist in rectifying the latter situation.

Notwithstanding these existing pretrial injustices as reported by the Civil Rights Commission, some might argue that in view of the changes recommended by the American Bar Association Project on Minimum Standards for Criminal Justice, the Mexican American or other indigent person charged with an offense would be guaranteed a speedy trial, and that damages relating to trial delay would therefore be nonexistent or, if existent, of an inconsequential nature. True, suggested and currently operative innovations such as: (1) eliminating bail (replaced by release on recognizance), (2) imposing pretrial detention only in abnormal circumstances,[25] (3) setting a maximum allowable interval between arrest and trial, and (4) requiring absolute discharge of accused upon lapse of interval,[26] would *in theory* leave little room for possible prejudice of an innocent person's rights. *In practice,* however, these safeguards—assuming all of them were adopted—might in fact deprive the very rights they would be attempting to protect.[27]

More specifically, the absolute discharge rule favored by the American Bar Association unreasonably frustrates the interests of society in bringing criminals to justice, and at the same time prejudices the innocent defendant who has not

| Education Level of Spanish Surnamed Population of Three Texas Counties (1960) | | | |
|---|---|---|---|
| County | Span. Surnamed Population | No. over 25 yrs. old with 5-7 yrs. of school | Median education level of those over 25 yrs old |
| Cameron | 96,744 | 14,818 | 3.9 |
| Hidalgo | 129,092 | 16,636 | 3.3 |
| Willacy | 13,734 | 1,461 | 2.8 |

*Id.* at 42.

24 *Id.* at 55-56.

25 These two liberal procedures were crystallized into law by the Federal Bail Reform Act, 18 U.S.C. § 3146 (1966). See text accompanying note 18, *supra.*

26 These two innovations have been recommended by the ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO A SPEEDY TRIAL (Approved Draft) 9 (1968) [hereinafter cited as ABA TRIAL STANDARDS].

27 To illustrate how these safeguards might explode in the face of their proponents, it would be well to consider the following hypothetical. Suppose, for example, that a Mexican American formerly convicted of several petty offenses were erroneously arrested by federal officials for his alleged involvement in the smuggling of narcotics into Texas from Mexico. Even though the man had been mistakenly identified and the police had been misinformed, his right to personal liberty would still be preserved since he would most probably be eligible for release on recognizance under the Federal Bail Reform Act, 18 U.S.C. § 3146 (1966). Moreover, assuming that he was drawing a meager income, he would also be eligible for a State-paid defense attorney under the Criminal Justice Act, 18 U.S.C. § 3006A (1964). Now suppose further that his State-appointed counsel, burdened with other legal matters, was not as attentive as he should have been and did not notice that the federal court—through administrative error—had scheduled his client's trial a few days beyond the maximum allowable arrest-to-trial interval. Upon the lapse of the interval and a granting of a motion for absolute discharge, the indigent accused would realize only a Pyrrhic victory. On the debit side he might have experienced loss of job, loss of reputation, and ruptured family ties, and on the credit side he could only inscribe "freedom from subsequent prosecution" for that offense. An innocent man should not have to bear this outlandish, exorbitant cost of government error. For a real-life example of the ridiculous extent to which court inefficiency may be carried, see the case of Charles Harling, Navarro and Taylor, *supra* note 12, at 47.

had the benefit of a trial in order to clear his name, nor the prospect of compensation for damages incurred. In *Barker v. Wingo,* a 1972 Supreme Court case pertaining to the prompt trial right, Mr. Justice Powell noted in the majority opinion:

> The amorphous quality of the [speedy trial] right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. . . .
>
> . . . . This type of rule is also recommended by the American Bar Association.[28]

In essence, Justice Powell is saying that the absolute discharge rule fails because it prevents justice from running its course. By its application, society is automatically precluded from redressing wrongs after the lapse of the de minimis period. In contrast, the proposed trial delay indemnity scheme would permit the defendant to come to trial—even after the lapse of the de minimis period—and, upon acquittal, to be eligible for just compensation. In this way the rights of both society and the accused would be protected. Society would be allowed the opportunity of determining the guilt or innocence of a defendant, and if innocent, the defendant would be placed in his original prearrest position through compensation. This is perhaps the clearest single basis for justifying a trial delay indemnity system.

## IV. Designing Legislation

Before one undertakes the immense task of spearheading legislation into a relatively uncharted area, it is essential to look to the results of previous expeditions and to the master cartographers who have traced the contours and identified the danger zones. In view of this, most of the discussion which follows will be devoted to the analysis of several public compensation statutes which are related materially to the proposed trial delay indemnity scheme. Useful criteria and conditions will be extracted from the statutes and supplemented by constitutional interpretations of the United States Supreme Court and other federal courts. By observance and application of these guidelines it is hoped that the

28 407 U.S. 514, 522-23 (1972). Aside from Justice Powell's concern over the possibility of emancipating a guilty person, the absolute discharge rule flounders for yet another reason in relation to an innocent defendant. ABA TRIAL STANDARDS, *supra* note 26, § 4.1 provides:

> If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, the consequence should be absolute discharge. Such discharge should forever bar prosecution for the offense charged and for any other offense required to be joined with that offense. *Failure of the defendant or his counsel to move for discharge prior to trial or entry of a plea of guilty should constitute waiver of the right to speedy trial.* (Emphasis supplied.)

The requirement for either the defendant or his counsel—after the lapse of the fixed interval—to move for discharge prior to trial or entry of a guilty plea is basically unsound—particularly from the standpoint of the indigent defendant. It is unsatisfactory because in many cases failure to make such motion could be attributable to counsel's inattentiveness or the defendant's educational handicap. *See* educational statistics, *supra* note 23, and cited matter *supra* note 24. Under these circumstances, a perfectly innocent man could conceivably go to trial after the lapse of the maximum interval and be convicted, erroneously, of a crime, or on the other hand, he might be acquitted and sustain substantial pecuniary injuries.

fundamental requisites of a viable trial delay indemnity system will of necessity emerge.

### A. *Survey of Related Statutes*

#### 1. Erroneous Conviction Compensation Statutes

Since the turn of the century, the plight of the erroneously convicted and imprisoned person has been mitigated in several jurisdictions by the enactment of special compensation statutes.[29] The chart appearing on the following page lays out in some detail a sampling of such schemes.[30]

29 At the federal level, the first United States legislator to attempt enactment of an erroneous conviction compensation statute was Senator Sutherland from Utah (later an Associate Justice of the United States Supreme Court) in 1912. The bill was ultimately defeated and it was not until 1938 that a federal act was passed regarding the subject. *See* Comment, *Criminal Law—State Indemnity for Miscarriage of Criminal Justice,* 21 N.Y.U.L.Q. Rev. 422, 425 (1946).

30 The chart is not intended to be exhaustive, but rather representative. All the statutes appearing therein are currently effective except that of North Dakota. It should be noted that many states which have no legislated system for compensating erroneously convicted persons indemnify such individuals by special enactment. Such a procedure is lengthy, and the results are often haphazard and inadequate. *See* Comment, *Persons Erroneously Convicted,* 13 St. John's L. Rev. 451, 453 (1939).

The French and German chart provisions may be found in Volumes 7 and 10, respectively, Comparative Criminal Law Project, The American Series of Foreign Penal Codes.

# *ERRONEOUS CONVICTION COMPENSATION (E.C.C.) STATUTES*

| | UNITED STATES | | | | | FOREIGN | |
|---|---|---|---|---|---|---|---|
| Jurisdiction | Federal | California | New York | North Dakota | Wisconsin | France | Germany |
| Statute Citation | 28 U.S.C. 2513 (1948) and 28 U.S.C. 1495 (1948) | Cal. Pen. Code §§ 4900-06 (West 1970) | N.Y. Executive Law § 19 (McKinney 1972) N.Y. Ct. of Claims Act § 9 (McKinney) (1963) | N.D. Code Ann. Ch. 12-57 (1943) | Wis. Stat. Ann. § 285.05 (1958). | French Criminal Procedure Code art. 626 (1963) | German Criminal Procedure Code § 467 (1965) |
| Reviewer of Claim | U.S. Ct. of Claims | State Board of Control | Court of Claims | Governor & Board of Administration | Governor & Dir. of Dept. of Public Welfare | Ct. of Cassation | Special Court |
| Eligibility Requirements | Person must have been convicted of an offense against the U.S. and imprisoned. His conviction must have been reversed or set aside on the grounds that he was not guilty of the offense, or he must have been pardoned on grounds of innocence and unjust conviction. | Person must have been convicted of a *felony* against the state and imprisoned, thereafter pardoned by the governor on grounds of innocence. | Person must have been convicted of a felony or misdemeanor and imprisoned, subsequently pardoned by the governor on the grounds of innocence. | Person must have been convicted of an offense against the state of which offense he claims to be innocent, or the person must have been pardoned on the grounds of innocence. | Same as North Dakota | Person must have been convicted of a misdemeanor or felony of which he was innocent, and he must have been prejudiced thereby. | Person must have been charged and subsequently acquitted or the prosecution against him must have been discontinued. |
| Proof and Procedure | Proof of facts must be by certificate of court, or of pardon. Other evidence thereof will not be received. | Attorney General may introduce opposing evidence. Petitioner must prove that either crime was not committed at all, or if committed, was not committed by him. | Finding of innocence must be based on evidence discovered after conviction. | Only evidence & circumstances arising after petitioner's conviction are admissible. Board must be satisfied that pet. is innocent beyond a reasonable doubt. | Same as North Dakota | Damages are charged to the state subject to its recourse against civil party, accuser, or false witness who brought about the conviction. | No right to indemnification exists if petitioner is ordered committed to an institution for cure or care. |
| Type of Damages Compensable | Silent | Pecuniary Injury | Silent | Silent | Silent | Silent | Silent |
| Maximum Amount Awardable | $5,000 | $10,000 (Increased from $5,000 in 1969) | No specific amount stated. "Should place defendant in the same position as if the indictment, information or complaint would have been dismissed at end of his trial" | A rate not greater than $1,500 per year, or a maximum of $2,000, subject to review and increase by the legislature. | A rate not greater than $1,500 per year, or a maximum of $5,000 subject to review and increase by the legislature. | Silent, but petitioner is charged with all costs if he fails. | Silent |
| Special Provisions | Petitioner must not have brought about his own prosecution by misconduct or neglect. Petitioner may institute claim in *forma pauperis*. | As to proof, petitioner must also show that he neither intentionally nor negligently contributed to causing his arrest or conviction. | | Petitioner must not have contributed by act or omission to bringing about his conviction. Damage finding appealable. | Same as North Dakota | Surviving dependents may present claim. Wide publicity given, on request, if petitioner is successful. | |

It will be observed from an inspection of the chart that eligibility requirements among the surveyed jurisdictions vary only slightly. Under all the systems, to be entitled to compensation, the person must have been convicted of a criminal offense and thereafter found to be innocent of the offense charged. The only significant variation is contained in the German statute which extends eligibility only to charged persons who have been acquitted at trial or, alternatively, against whom a prosecution has been discontinued. Note also that under the German scheme, a person charged is ineligible for indemnification if he is ordered to a State institution for cure or care — the underlying theory evidently being that the State has discharged its duty to the individual by providing adequate medical care. California is the only one of the surveyed jurisdictions which specifically limits eligibility to persons erroneously convicted of a felony. The other jurisdictions apparently compensate whether the offense is a misdemeanor or a felony.

The bodies appointed by the statutes to review claims generally fall into one of three categories: (1) special board appointed and chaired by the governor, (2) a special court, or (3) a court of claims. The United States and New York utilize a court of claims for review purposes.

With regard to proof and procedure, California is the only jurisdiction which specifically permits the Attorney General to introduce evidence in opposition to the claim, though such permission may be tacitly implied from the other statutes. Three states (New York, North Dakota, and Wisconsin) require that compensation be allowed only where innocence is predicated upon evidence or circumstances arising *after* the claimant's conviction. As an additional prerequisite to compensation in California, the Board must find that either the crime with which the claimant was charged was not committed, or if committed, was not committed by the claimant. In Wisconsin and North Dakota, the Board must be convinced *beyond a reasonable doubt* that the claimant was innocent of the offense charged. Finally, under the majority of the American jurisdictions surveyed, the petitioner waives his right to indemnity where it can be shown that he in any way contributed to the bringing about of his own arrest or conviction.

As to the type of damages compensable, the California statute is the only one which makes reference to the subject with any degree of specificity, but even that reference—"pecuniary injury"—is decidedly vague.

Maximum amount of damages awardable to successful claimants ranges from $2000 in North Dakota to an unstated limit in French, German, and New York jurisdictions.[31] The New York statute, though silent with regard to the exact amount, stipulates that the award should be sufficient to place the defendant in the same position as if the indictment, information, or complaint had been dismissed at the conclusion of the trial.[32] North Dakota and Wisconsin,

31 It's worthy of note in this regard that a 1969 amendment in California increased the maximum indemnity from $5,000 to $10,000.

32 Although the beneficent nature of this provision may be admired, it seems to be beyond the realm of practicality. Conceivably under such a provision, the government which had been responsible for wrongfully convicting a prominent businessman could be held liable to the claimant—just on a lost wage theory—in an amount in excess of several hundred thousands

while establishing a maximum award, also permit the Board to submit the claim to the legislature for consideration when in the members' opinion—and in view of the circumstances of the case—the statutory maximum award is inadequate.

Additional provisions of considerable interest are contained in the French statute. As indicated in the chart under the French scheme damages are paid to the successful claimant by the State which in turn has recourse to institute an action for recovery against the civil party, accuser, or false witness through whose fault the conviction arose. Furthermore, by the incorporation of a specific provision, not only does the erroneously convicted person have a right to bring a claim against the State, but so also do his legal heirs. Finally, and perhaps most importantly, upon the request of a successful claimant, the facts of his innocence and associated indemnity award are given wide publicity.

### 2. Preliminary Detention Compensation Statutes

As noted previously in the introduction, several European countries and municipalities have enacted legislation which provides for the compensation of innocent pretrial detainees.[33] Representative of the European enactments is the German statute, the major provisions of which are illustrated in the chart on the next page. It should be noted that according to the provisions of this statute, a

of dollars if the claimant had been imprisoned for several years. There is a social duty to compensate, but there *also* exists a legislative duty in this case to draw a line!

33 See note 6, *supra*. Although France does not currently have such a statute in force, it would be presumptuous to infer from this that no effort along these lines has *ever* been made. In 1890 a bill was put forward in France to provide indemnity for persons falsely arrested and prosecuted. The bill, in part, read, "Any person victim of an arrest, of a prosecution or condemnation recognized as an error is entitled to an indemnity equal to the damage that be incurred." The bill was defeated by a vote of 405-83. Voltaire must have turned over in his grave. *See* Loubère, *French Left-Wing Radicals and the Law As a Social Force, 1870-1900*, 8 Am. J. Legal Hist. 54, 65 (1964).

PRELIMINARY DETENTION COMPENSATION (P.D.C.) STATUTE[34]

| Reviewer of Claim | Eligibility Requirements | Excluded Individuals | Proof | Type Damage | Max. Amt. | Special Provisions |
|---|---|---|---|---|---|---|
| Special Court | Person who has been preliminarily detained and subsequently acquitted or against whom no probable cause has been shown to exist.<br><br>Legal dependents are entitled to compensation. | No claim exists:<br><br>1. Where person intentionally caused his detention, or where the measure was due to his gross neglect.<br><br>2. Where offense showed considerable dishonesty or immorality or had been committed in a state of intoxication, or where a detained person was arrested in the preparation of an offense.<br><br>3. Where person had been dispossessed of civil rights or was subject of police surveillance.<br><br>4. Where person had been subject to confinement in a workhouse or penitentiary less than 2 or 3 years (respectively) before. | Either innocence must be proved, or lack of probable cause for arrest must be shown. | Financial damage suffered | Silent | Claim does not exist when public interest, regardless of the nature of the offense required temporary commitment<br><br>No indemnification if judgment imposed commitment to institution for cure or care. |

person satisfies the basic requirements for eligibility if he has been: (1) preliminarily detained and subsequently acquitted or (2) found to be the subject of an arrest based upon inadequate probable cause. A legal dependent of a deceased, but otherwise eligible, claimant is also entitled to institute a proceeding under the act. But notwithstanding the basic requirements for eligibility, it is clear from the statute that claims advanced under certain conditions can nevertheless be summarily excluded. For example, no claim exists where the petitioner has contributed actively or negligently to the bringing about of his detention. Moreover, a claim is subject to rejection where circumstances reflect that the petitioner has been detained while in the preparation stage of an offense or was the subject of police surveillance. Finally, a claim under the statute may be dismissed if the petitioner has been subject to previous confinement as specified.[35]

In reference to damages, recovery under the act is limited to "financial

34 German Law Concerning Compensation for Preliminary Detention Innocently Suffered, July 14, 1904 as reproduced in G. MUELLER & F. LE POOLE-GRIFFITHS, *supra* note 7, at 109-11.

35 Of the reasons stipulated for excluding claims, this one seems to evade comprehension and logic. The claimant who has been previously confined is generally a prime candidate for erroneous preliminary detention. Once branded a convict, he naturally becomes suspect if connected *even remotely* with a crime. As one writer notes:

> . . . Labeling a person a criminal may set in motion a course of events which will increase the probability of his becoming or remaining one. The attachment of criminal status itself may be so prejudicial and irreversible as to ruin the future of a person who previously had successfully made his way in the community . . . . TASK FORCE REPORT: COURTS, *supra* note 14, at 5.

damage suffered," and no effort is made elsewhere in the statute to clarify the term. No maximum amount of damages is specified, but the act clearly stipulates that no recovery is possible where the claimant was committed to a state institution for cure or care. Of prime significance is the special provision eviscerating the basis of a claim where *public interest*—regardless of the nature of the offense—required temporary commitment.

3. Criminal Victim Compensation Statutes

In the last decade, government programs designed to compensate innocent victims of crime have been steadily gathering momentum throughout the world.[36] The first compensation program was enacted in New Zealand in 1963,[37] followed by Great Britain in 1964.[38] In this country, California was the first to adopt such a program in 1965,[39] and other states have followed her lead. Although there is no federal statute on criminal victim compensation currently in force, there are indications that Congress may be at the threshold of a legislative breakthrough with regard to the subject.[40]

While the criminal victim compensation statutes are not directly related to the theme of indemnifying the innocent, they *do* provide assistance in establishing eligibility and damage criteria for the proposed trial delay indemnity scheme.[41] The chart appearing on the next page highlights the major provisions of assorted enactments in the United States and abroad.[42]

36 The theory of compensating innocent victims of crime antedates even Voltaire. Sections 22-24 of the Code of Hammurabi (about 2250 B.C.) provided a means by which victims of robberies could be compensated by the city. *See* Comment, *Criminal Victim Compensation in Maryland*, 30 Md. L. Rev. 266, 279 (1970).

37 Criminal Injuries Compensation Act, No. 134 of 1963 (N.Z.).

38 For particulars, refer to Compensation for Victims of Crimes of Violence, Home Office (London 1964).

39 Cal. Gov't Code § 13960 (West Supp. 1970).

40 Senator Ralph Yarborough introduced the first crime victim compensation bill in Congress in 1965 (S. 2155) and followed that with S. 646 in the 90th Congress (1967) and S. 9 in the 91st Congress (1969). The bills failed to pass. In the 91st Congress, Senate Majority Leader Mike Mansfield took up the cudgel and introduced S. 4576, then reintroduced substantially the same bill in the 92d Congress (S. 750). The only significant difference between the Yarborough and Mansfield bills seems to be that under the latter, the Commission could make grants to share up to 75 percent of the cost of crime victim compensation programs established by the states.

Other senators have introduced similar legislation in the 92d Congress. Senator Hartke's bill (S. 2856) would provide compensation nationwide for crimes at both state and federal levels with *no ceiling* on the amount of compensation. It would include compensation for both psychiatric care and pain and suffering. In addition, under Senator Hartke's proposal, the Commission would make matching grants to the states on a 90-10 basis for crime victim compensation programs. A bill recently introduced by Senator McClellan (S. 2994) is used as a basis for comparison in this work because it seems to provide a reasonable compromise proposal. *See* Kass, *Compensation for Victims of Crime*, 58 A.B.A.J. 968, 969 (1972).

41 Perhaps the criminal victim compensation statutes are more analogous to our study than first impression might suggest. Is not an innocent person who has been arrested and detained an unreasonable length of time, a victim of a crime—the crime of which he was erroneously accused? Moreover, there seems to exist as much or more justification for funding an indemnity scheme which compensates victims who have been injured by an arm of society (the criminal justice system) than there is for financing a system which indemnifies the victims of the free acts of criminals over whom society may exert little or no control.

42 Although not represented on the chart, French criminal procedure permits a person who personally has suffered physical harm to conduct a civil action simultaneously with the criminal prosecution. Comparative Criminal Law Project, The American Series of Foreign Penal Codes: The French Code of Criminal Procedure art. 3 (1963).

The German provisions appearing in the chart may be found in 10 Comparative Criminal Law Project, The American Series of Foreign Penal Codes.

# CRIMINAL VICTIM COMPENSATION (C.V.C.) STATUTES

| | UNITED STATES | | | | | FOREIGN | |
|---|---|---|---|---|---|---|---|
| Jurisdiction | Federal | California | Maryland | Massachusetts | New York | New Zealand | Germany |
| Statute Citation | S. 2994, 92d Cong., 1st Sess. (1972) | Cal. Govt. Code §§ 13960-66 (West Supp. 1972) | Md. Code Ann. Art. 26A (Supp. 1971) | Mass. Laws Ann. Ch. 258A (1968) | N.Y. Executive Law §§ 620-35 (McKinney 1972) | 1 New Zealand Stat. No. 134 (1963) | German Criminal Procedure Code §§ 403-06 (1965) |
| Reviewer of Claim | Violent Crimes Compensation Board | State Board of Control | Criminal Injuries Compensation Board | District Court | Crime Victims Compensation Board | Crimes Compensation Tribunal | Trial Court or Magistrate Court |
| Eligibility Requirements | A person who was a victim of a crime or a dependent of such victim. A criminal, accomplice, person living in the household of criminal or maintaining sexual relations with the same are ineligible. | A person who sustains injury to himself, or pecuniary injury as a result of injury or death of another on whom he is dependent, and which is result of a public offense. Also, one who attempts apprehension, aid, or rescue. | A victim of a crime, surviving dependent, any other person depending on victim for direct support, or any person attempting to prevent a crime or apprehend offender. $500 penalty for false claim. | A victim of a crime or his dependent, if victim is deceased. An offender, accomplice, person living in the household of criminal or maintaining sexual relations with same are ineligible. Victim must not have contributed to his injuries. | A victim of a crime, surviving dependent, or any other person depending on victim for direct support. Person criminally responsible for the crime, accomplice, or member of criminal's family are ineligible. | A victim (or dependent) suffering injuries or death from an offense listed in a specific schedule of crimes. A victim is eligible even if offender is member of family. | Injured person or heir. Generally, the claim must involve property rights. |
| Proof and Procedure | Injury or death must have been reported to police within 72 hours. Claimant must show that act occurred and injury resulted therefrom. | Claimant must show nature of crime, extent of injury, and that injury was a direct consequence of the crime. Claimant must show need. | Claimant must show crime was committed and injury was direct result, and that crime was promptly reported to police. Board's finding subject to court review. | Claimant must show that crime was committed and resulted in personal physical injury or death. | Claimant must show that crime was committed which directly resulted in personal physical injury, and that crime was reported within 48 hours. | Victim must show on a balance of probabilities that his injury was a result of crime. | Claim must be presented in criminal proceeding in writing or orally against accused. If defendant is found not guilty, no claim exists. |
| Type of Damages Compensable | Medical expenses, Hospital expenses, Loss of past wages, Loss of future wages, Cost of funeral, Loss of support | Medical expenses, Hospital expenses, Loss of wages, Loss of support, Other necessary, expenses (atty. fees) | Physical disability Lost wages Lost future earnings | Out-of-pocket medical and other expenses. Actual loss of earnings and support. | Out-of-pocket medical and other service expenses, actual loss of earnings and support. | Actual pecuniary loss, including loss of earnings and pain and suffering. | Loss or injury to property. |
| Maximum Amount Awardable | Min of $100 or 2 weeks lost wages max. of $50,000 subject to reductions by other compensation. | $5,000 | Minimum of $100 or 2 weeks lost wages. Maximum of $45,000 subject to reductions by other compensation. | Minimum of $100 or 2 weeks lost wages. Maximum of $10,000. | Minimum of $100 or 2 weeks lost wages. Maximum of no more than $100/week for lost earnings.—$15,000 | $25/week, lost earnings; $2,250 for out-of-pocket costs; $1,125, pain and suffering | Silent |
| Financing of Fund | Government subrogated to claim of victim. Fund open to public and private contributions. | Fines from convicted offenders who inflicted injuries placed in fund. | Fines imposed on all crimes increased by $5.00 (except Motor Vehicle & Game fines). | Government subrogated to claimant's right of action against offender. | Government subrogated to claimant's right of action against offender. | Government subrogated to claimant's right of action. | Silent |
| Statute of Limitations | Within one year of date of injuries. | Within one year of date of injuries. | Within 180 days after crime. | Within one year after crime. | Within 90 days of crime or death. | Within 2 years of injury. | Silent |
| Special Provisions | Claimant must not have contributed to his injuries. Emergency awards may be paid while decision is pending. | Amount recoverable is reduced to the extent of compensation claimant receives from other sources. | Emergency awards may be paid while decision is pending. | Amount recoverable reduced by compensation from other sources. Attorney General may introduce evidence pro and con with regard to claim. | Amount may be reduced by other compensation received Decision subject to Court review. Emergency award possible. Claimant's need is a consideration. | Amount may be reduced by other compensation. Claimant must not have contributed to injuries. | If claim is not granted, decision is subject to review. |

As indicated on the chart all the enactments provide for the recovery of lost earnings (including out-of-pocket expenses) except the German statute, which pertains essentially to damage inflicted upon the claimant's property. The federal bill and the Maryland act provide specifically for lost future earnings. The amount of damages recoverable ranges from $3,375 under New Zealand law to an unstated limit in the German act. In all the jurisdictions with the exception of Germany, the amount recoverable may be reduced by the amount of compensation the claimant receives from outside sources. Emergency awards pending decision are permitted under the federal bill, Maryland and New York acts.

Indemnity funds are apparently partially financed in one of two ways: (1) by subrogating the State to the claimant's right of action against his offender (federal bill, Massachusetts, New York, New Zealand acts); (2) by fining the offender, if apprehended and convicted, to a degree commensurate with his economic condition (California act). The state of Maryland, as a novel solution, has increased every criminal fine (excluding motor vehicle and game regulation offenses) by $5.00.

Under all the statutes a surviving dependent is a proper claimant, and under the American enactments there is a statute of limitations governing the period in which a claim may be asserted. Eligibility is tainted under the federal bill, Massachusetts and New Zealand laws if the claimant in any way contributed to the infliction of his injuries.

### B. *Criteria*

Having briefly analyzed and compared provisions of compensation statutes related to the proposed trial delay indemnity system (hereinafter also referred to as TDI), we are now somewhat better prepared to direct our attention to the task of establishing basic criteria for prototype legislation.

As alluded to previously in this discussion, the theory of compensating the innocent for trial delay is premised on the notion of the defendant's constitutionally guaranteed right to a speedy trial. Under a TDI system this prompt trial is quantified into a maximum time interval referred to as a *de minimis standard*. Provided that an individual has satisfied certain *eligibility requirements*, he is entitled to *prove* and *recover* damages he has sustained as a result of delay beyond the minimum permissible interval. The several elements of this right of recovery will be discussed separately in relation to the proposed legislation.

#### 1. The De Minimis Standard

##### a. *Legitimacy*

The practice of establishing maximum time intervals in order to identify violation of a defendant's prompt trial right is not new. Several states presently have such time limits in effect and have had them for many years.[43] Until recently

43 Cal. Pen. Code § 1382 (West 1970) (15 days from date held to answer to filing of information, 60 days from filing of information to trial); Ill. Rev. Stat. ch. 38, § 103-5(a)

the Supreme Court of the United States had avoided the question of quantifying the speedy trial right into a number of days, months, or court terms.[44] In 1972, however, Mr. Justice Powell writing the majority opinion in *Barker v. Wingo* in effect legitimated the practice with respect to the states when he commented:

> We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. *The States, of course, are free to prescribe a reasonable period* consistent with constitutional standards, but our approach must be less precise.[45] (Emphasis supplied.)

It is not altogether clear from this statement what the Supreme Court's view would be if the United States Congress passed a law establishing maximum tolerances for trial delay, though a calculated guess would be that the Court would have to honor such tolerances if they were "consistent with constitutional standards."

### b. *Designation of Interval*

Obviously, any one of several time intervals could be selected for a TDI system (*i.e.*, arrest-to-final disposition, arrest-to-trial, indictment-to-trial, etc.), but the one which appears to be best geared to TDI needs is arrest-to-trial.

The date of *arrest* or date of formal charge in cases where no actual arrest occurs, seems to be a logical starting point for the interval in view of a 1971 U.S. Supreme Court decision, *United States v. Marion,* in which the Court laid down the rule that the sixth amendment speedy trial guarantee does not attach until a person is charged or arrested.[46] The American Bar Association in formulating speedy trial standards had previously recommended the same starting point.[47]

As to the selection of the opposite-end point for the interval, the date of the commencement of the trial seems appropriate in view of society's interest in bringing the issues before a tribunal within a reasonable period of time. Delay occurring *during* the trial should be an issue for consideration in determining the *amount* of damages to be awarded to an innocent individual. This selection is

(1965) (120 days from arrest); MASS. LAWS. ANN. ch. 277, § 72 (1956) (6 months from time of imprisonment or bail); PA. STAT. ANN. tit. 19, § 781 (1964) (6 months from commitment); WASH. REV. CODE §§ 10.37.020, 10.46.010 (1961) (30 days from date held to answer to indictment or information, 60 days from indictment or information to trial). *See* ABA TRIAL STANDARDS, *supra* note 26, at 14-15.

44 The reason for the Court's heretofore adamant position in this regard is best explained by a consideration of its holding in Smith v. United States, 360 U.S. 1 (1959). See note 10, *supra.*

45 407 U.S. 514, 523 (1972).

46 404 U.S. 307, 321 (1971). It should be noted that this rule might be considered as a minimum standard to be observed by the *states* under the decision of *Klopfer v. North Carolina,* 386 U.S. 213 (1967) which made applicable to the states through the fourteenth amendment, the sixth amendment guarantee of the right to a speedy trial.

47 ABA TRIAL STANDARDS, *supra* note 26, § 2.2(a) provides in part:

> The time for trial should commence running, without demand by the defendant, as follows:
>
> (a) from the date the charge is filed, except that if the defendant has been continuously held in custody or on bail or recognizance until that date to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, then the time for trial should commence running from the date he was held to answer . . . .

supported by Rule 48(b) of the Federal Rules of Criminal Procedure which implements the sixth amendment and authorizes dismissal at the court's discretion if there is unnecessary delay in charging the defendant or unnecessary delay in *bringing* the defendant to trial.[48] While the implication of the Federal Rule is by no means conclusive, the date of the commencement of trial does seem to be a reasonable choice and is in consonance with the basic purposes of the indemnification system.

### c. *Length of Interval*

Several States, it was noted, have already established maximum tolerable intervals of delay—some in days or months, some in court terms. The American Bar Association suggests that the de minimis standard be expressed in terms of months or days rather than court terms, because under the former methods it is easier to determine whether the interval has lapsed.[49] What should be obvious, though, is that no single time interval can be designated or recommended for blanket application in all jurisdictions.[50] De minimis standards should be established according to conditions peculiar to individual jurisdictions; and within those jurisdictions, standards should vary as to the type of offense involved[51] and as to the pretrial disposition of the defendant (*i.e.*, detention, bail, or recognizance).[52]

In 1968 the President's Commission on Law Enforcement and Administration of Justice published a report which contained a model timetable for felony cases. In it the Commission suggested that a reasonable maximum time interval from arrest to trial should be approximately 70 days and that a reasonable time interval between arrest and final disposition should be about four months.[53] Although these guidelines are by no means feasible for every jurisdiction, they provide a rule of thumb by which various jurisdictions can measure their administrative efficiency in relation to their judicial obligations to defendants.

## 2. Eligibility

### a. *Finding of Innocence*

One of the foremost considerations in establishing eligibility requirements for a TDI scheme is to provide an absolute shield against the possibility of remunerating a guilty person. Consequently, a condition precedent to recovery should be a finding of innocence. Such a determination could be made by a

48 *But see* Note, *The Lagging Right to a Speedy Trial,* 51 VA. L. REV. 1587, 1589-90 (1965) wherein the writer contends that no court would give much weight to this implication of Rule 48(b).

49 ABA TRIAL STANDARDS, *supra* note 26, at 14. The Committee rejected the court-term technique as a holdover from the circuit riding days which often results in lack of uniformity and much misunderstanding in application.

50 *Id.*

51 Note, *The Right to a Speedy Trial,* 20 STAN. L. REV. 476, 499 (1968). *See also* Justice Powell's remarks in Barker v. Wingo, 407 U.S. 514, 530-31 (1972).

52 TASK FORCE REPORT: COURTS, *supra* note 14, at 85.

53 *Id.* at 84, 86, 87.

judge or jury by means of a special verdict upon a person's acquittal. Borrowing from the North Dakota and Wisconsin erroneous conviction compensation statutes, innocence might be judged on a "beyond a reasonable doubt" standard. In consonance with the California erroneous conviction compensation statute, the term "innocence" might signify that either the crime with which the defendant was charged had not been committed, or if committed, was not committed by the defendant, and, in any case, that the defendant did not contribute to the bringing about of his arrest.[54]

Admittedly, the joint requirement of a de minimis standard and a finding of innocence could work a serious hardship on the innocent person whose case is *dismissed* for lack of evidence or for other reasons before the lapse of the de minimis period. Moreover, the finding of innocence requirement alone would give rise to an apparently inequitable situation where the dismissal would occur *after* the running of the period, but prior to or during the trial. Unfortunately, no completely adequate provision can be made for persons whose cases are dismissed under these two circumstances, though one partial solution in the second situation might be to permit the dismissed individual to recover damages upon a showing that his arrest was not based upon probable cause,[55] or that it was brought about fraudulently by another person or persons.

Similarly in those states which automatically *discharge* persons upon the lapse of the period, the requirement of a finding of innocence would be equally harsh. Thus, to offset this inequality, persons so discharged could—under a TDI system—have the right to opt for trial in order to clear their names and possibly to qualify for compensation if acquitted.[56] It is doubtful that many persons, guilty or innocent, would take advantage of such an option, but still, that course of action should be available.

### b. *Cause of Delay*

A petitioner seeking relief from the government for trial delay should be required to come to the court with "clean hands." This tenet, originally espoused in *United States v. Lustman*[57] in 1958 and echoed in *Barker v. Wingo*[58] in 1972,

54 Such is the case under the California erroneous conviction compensation statute. *See* E.C.C. Chart *supra* in text. Notice also that three other jurisdictions (Federal, North Dakota, and Wisconsin) deny eligibility to a person who contributed to the bringing about of his own arrest (and conviction). This is an important consideration in a trial delay indemnity arrangement because it is conceivable that a person might intentionally cause himself to be arrested with a view to collecting indemnity when subsequently acquitted.

55 This solution is derived from a combination of eligibility provisions under the German erroneous conviction compensation statute which authorizes the indemnification of an innocent person where the prosecution has been discontinued, and the German preliminary detention compensation statute which permits compensation of persons arrested without probable cause. *See* E.C.C. and P.D.C. Charts *supra* in text. That dismissal is a relatively commonplace procedure, particularly at the federal district court level, is dramatically illustrated by the statistics presented in note 17, *supra*.

56 A provision such as this would ameliorate the innocent defendant's position with respect to the absolute discharge rules currently in effect in several states and presently lauded by the American Bar Association. *See* text accompanying notes 27 and 28, *supra*. Some of the state discharge statutes currently in force include: N. D. CENT. CODE § 29-18-06 (1959); UTAH CODE ANN. § 77-51-6 (1953). Ambiguity exists in much of the discharge legislation as to whether a subsequent prosecution may be brought. *See* Annot., 50 A. L. R.2d 943 (1956).

57 258 F.2d 475, 477 (2d Cir. 1958), *cert. denied*, 358 U.S. 880 (1958).

58 407 U.S. at 529. For a diluted, perhaps more rational approach to the "clean hands"

prescribes that where delay is attributable to the defendant, he thereby waives his right to a speedy trial. While such a rule possesses some merit, it is ostensibly too severe and inflexible as applied to a TDI system. Perhaps the better rule is the one which has been adopted by the American Bar Association whereby defendant-caused delay and delay due to exceptional circumstances are excluded in the computation of the delay to be measured against the de minimis standard. For example, suppose that in a particular jurisdiction an arrest-to-trial de minimis standard for the defendant's specific offense and pretrial disposition is 80 days. Assume further that 100 days have already elapsed since the defendant's arrest, but a delay of 30 days has been caused by the defendant's request for a continuance. In this case then, only 70 days of delay could be attributed to the government, which figure does not exhaust the statutory 80-day de minimis period. Thus, for TDI purposes, the only delay which gives rise to a defendant's cause of action for indemnity is not the extent of the de minimis standard in its strict sense, but rather the length of government-caused, or *effective* delay, as measured against the de minimis standard. Where effective delay exceeds the standard, *excessive* delay results. It is this latter increment of delay which forms the basis of an indemnity claim. Additionally, the amount of excessive delay is a factor in determining the amount of damages awardable in any given circumstance.

### c. *Type of Delay*

If in a specific case the measure of effective delay is computed and found to be in excess of the de minimis standard, the question then arises as to whether the effective delay must have been imposed in any special *manner* in order to qualify the defendant for an indemnity action.

In the past, federal courts have used the terms "purposeful or oppressive"[59] and "culpable"[60] to describe reprehensible government-caused delay, but in the recent *Barker* case, the Supreme Court eased this requirement by "placing the primary burden on the courts and the prosecutors"[61] to assure that cases are brought to trial within a reasonable time. The "reasonable time" aspect of the indemnity scheme is, of course, pre-established by the de minimis standard. The mere fact that the de minimis standard is exceeded should raise the presumption of unreasonableness. Thus, it stands to reason that an individual bringing a claim for indemnity should not be required to show that the delay was imposed in an oppressive or culpable manner.

### d. *Demand-Waiver*

Several states rely on what is referred to as the demand-waiver doctrine in ascertaining at what point in time the defendant's right to a speedy trial has been

doctrine, see ABA TRIAL STANDARDS, *supra* note 26, § 2.3.

59 Pollard v. United States, 352 U.S. 354, 361 (1957); United States v. Penn, 267 F. Supp. 912, 913 (E.D. La. 1967).

60 Fleming v. United States, 378 F.2d 502, 504 (1st Cir. 1967).

61 Barker v. Wingo, 407 U.S. 514, 529 (1972).

violated.[62] Generally, the doctrine provides that a defendant waives his right to a speedy trial for any period prior to which he or his attorney has not demanded trial. Recently, in *Barker v. Wingo,* the Supreme Court denounced such a rule as inconsistent with other Court decisions on waiver of constitutional rights—specifically the decisions in *Miranda v. Arizona*[63] and *Boykin v. Alabama.*[64] At one point in the *Barker* opinion Mr. Justice Powell remarked:

> A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. Moreover, for reasons earlier expressed, society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest.[65]

It should be clear from this that, under a TDI scheme, no requirement for defendant's demand for a speedy trial should exist.

3. Proof and Procedure

a. *Reviewer of Claim*

From the analysis of the various compensation statutes, it was determined that in most cases claims for indemnity are reviewed by a specially designated board, a court of claims, or a special court. For purposes of drafting legislation with respect to TDI, a court of claims will be used, though individual states might find one of the other alternatives best tailored to their needs.

b. *Burden of Proof*

Assuming that an individual brings a claim for damages, advancing evidence of: (1) a finding of innocence, or a dismissal when excessive delay exists and lack of probable cause or fraudulent arrest is shown; (2) the existence of a de minimis period for his particular offense and pretrial disposition; and (3) that the measure of effective delay of his trial exceeds the de minimis standard, a presumption of government liability should arise until the state can discharge its burden of proof. In order to rebut this presumption, the government should be required to show that any or all of the three above state elements are unfounded.

c. *Standard of Proof*

The question of standard of proof to be required of the government is not immediately answerable without some background discussion. Although at first impression the appropriate standard would appear to be the normal civil, or preponderance of evidence standard, there are other considerations.

In 1967 the Supreme Court handed down a decision which tends to cloud

62 *See generally* Annot., 57 A.L.R.2d 302, 326 (1958).
63 384 U.S. 436 (1966).
64 395 U.S. 238 (1969).
65 407 U.S. at 527 (footnotes omitted).

the issue of a proper selection of a standard of proof in a TDI scheme. The case was *Chapman v. California* and in it the Court formulated what is now referred to as the "harmless-error" rule. Stated simply, the rule is that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless *beyond a reasonable doubt.*[66] Since the de minimis standard is premised on the concept of minimum rights afforded by the Constitution, and when exceeded, constitutional harm is presumed and the burden of proof is shifted to the prosecution, it seems to follow that the prosecution should have to discharge its burden of proof on a beyond a reasonable doubt standard. Despite the fact that this standard appears to be unusually stringent, it evidently is the one adopted by the Supreme Court to ensure the safeguard of constitutional rights. Under the TDI system then, if the government is unable to discharge its burden of proof beyond a reasonable doubt, government liability is established and the claimant is then entitled to plead and prove damages.

4. DAMAGES

a. *Type of Damages*

As to the issue of damages, the onus of proof should of course be on the claimant. Recovery should be allowed for any pecuniary injury suffered which is of the type normally awardable under the public compensation statutes.[67] Compensable pecuniary injury should include the following:

(1) lost wages[68]
(2) expense of litigation[69]
(3) other incurred expenses[70]

In addition a graduated award scale based upon excessive delay should be established. By such scale a claimant could be compensated for mental anguish and tainted reputation in proportion to the nature of the crime of which he was accused and to the protracted delay of his trial. Although such an award system would by its very nature be arbitrary, at least *some* compensation for non-pecuniary injury would flow to the defendant.[71]

66 386 U.S. 18, 24 (1967). *See generally* Note, *Harmless Constitutional Error,* 20 STAN. L. REV. 83 (1967).

67 See criteria as to type of damages, P.D.C., C.V.C., and E.C.C. (California) Charts, *supra* in text.

68 This expression, of course, encompasses wages lost *during* the de minimis period. Lost *future* earnings due to a successful claimant's inability to find immediate employment are not included because of the impossibility of quantifying such a recovery before the fact.

69 This of course would not be awarded where the claimant proceeded with State-appointed counsel. Note that the state of California specifically provides for the reimbursement of attorney fees, C.V.C. Chart, *supra* in text. Such provision for litigation expenses gathers even more importance when one considers that key defense witnesses may have to be transported great distances to appear at trial.

70 An example of such an expense would be where a widower with children was incarcerated and his trial was delayed. Reasonable expenses incurred by a relative of the defendant in caring for the children in the father's absence would be a proper matter for compensation.

71 Hopefully, this would provide a compromise between the complete lack of recovery for nonpecuniary injuries under the public compensation statutes surveyed and Senator Hartke's proposal for a no-ceiling measure in criminal victim compensation legislation. *See generally* E.C.C., P.D.C., and C.V.C. Charts *supra* in text and note 40, *supra.*

b. *Measure of Damages*

Unlike the New York erroneous conviction compensation statute and the foreign versions, some upper limit on the total amount of recoverable damages should be established. This limit would vary from state to state but in no case should it be fixed below $5,000.[72] Judgments should be appealable to the next higher court.[73] Additionally, it should be relatively obvious that where the maximum award authorized is grossly inadequate in a given situation, the claimant would have recourse to obtain an incremental allowance through the legislature.

5. Other Considerations

Present compensation statutes suggest additional provisions which should be incorporated into the TDI scheme. First of all, TDI eligibility should not be limited to the petitioner himself but should extend to his surviving dependents.[74] It would only be on rare occasions that such a provision would come into play, but the death of the claimant after his acquittal (or reversal of conviction at the appeal level) and before his claim could be heard is a circumstance which should be accommodated by the act. Eligibility should also be extended to claimants who are concurrently serving a prison sentence on another charge. The mere fact that a person is in prison on another charge (even if in another jurisdiction) should not exempt the government from guaranteeing the defendant his speedy trial right.[75]

A claimant who was committed to a government institution for cure or care subsequent to his arrest and who is otherwise eligible to bring a claim for indemnity, should have his recovery reduced by the amount of financial benefit derived from his committal.[76] If the government can show that due to his mental or physical condition, the claimant would have been incapable of making any income during the time covered by the de minimis period—even if he had not been arrested—the government should not be liable for any damages claimed. If the plaintiff receives compensation from outside sources, this should also be taken into account when computing the claimant's award.[77]

72 The majority of American erroneous conviction compensation statutes stipulate this amount or a higher one. Of the states surveyed, only the allowance in the North Dakota statute dips below this figure. *See* E.C.C. Chart *supra* in text.

73 *See* North Dakota and Wisconsin provisions, E.C.C. Chart, *supra* in text.

74 *See* French provision (E.C.C. Chart), German provision (P.D.C. Chart), and all jurisdictions (C.V.C. Chart), *supra* in text.

75 The prompt trial right is extended to a person incarcerated for committing another crime because the delay in bringing such person to trial may ultimately result in as much oppression as is suffered by one who is jailed prior to trial. One of the obvious disadvantages of a denial of the right is that the defendant is thereby forced to forego the possibility of serving a concurrent sentence. In addition, under present prison procedures, the duration of the defendant's imprisonment might be increased and conditions under which he must serve his sentence might be greatly worsened due to a pending criminal charge. Smith v. Hooey, 393 U.S. 374 (1969); *see also* Dickey v. Florida, 398 U.S. 30 (1970). Along these lines, it should be noted that the existence of an outstanding criminal charge no longer automatically makes a prisoner ineligible for parole in the federal prison system. 28 C.F.R. § 2.9 (1968).

76 *See* German statutes, E.C.C. and P.D.C. Charts, *supra* in text.

77 *See* all jurisdictions with the exception of Germany, C.V.C. Chart, *supra* in text. It is doubtful that this provision would be applicable in very many cases. However, should some philanthropist decide to compensate a claimant personally, the government should be liable only for the uncompensated portion of his judgment.

Provision should be made in the TDI scheme for self-financing. Thus, in addition to the normal right of prosecution, the government should be subrogated to the cause of action of the successful claimant as against any person who intentionally or fraudulently brought about his arrest.[78] Fines from such convictions and awards from such suits should be placed in a special indemnity fund.[79] Such fund should also be open to private and public contributions[80] and fines for certain designated offenses should be increased a proportionate amount with the proceeds going to replenish the fund.[81]

Two final provisions should be included. First, where the claimant has been found innocent and subsequently awarded delay compensation, upon his request widest publicity should be given to this fact.[82] Secondly, where compensation of an otherwise eligible claimant would be contrary to the public interest, the court should be permitted to decline to award damages.[83]

## V. Proposed Bill

The Model Bill Outline appearing below furnishes the basic framework upon which interested lawyers and legislators might construct a workable TDI system. The Outline is by no means intended to identify and resolve all of the perplexities related to trial delay indemnity, nor even to provide the most appropriate solution to those problems already considered. Rather, it provides a basic blueprint—a point of departure for further legislative investigation.

### Model Bill Outline—Trial Delay Indemnity

§ 1. *Purpose*

The objective of this Act is to provide a means by which individuals whose trials have been delayed excessively by the State, and who are subsequently found innocent or dismissed, may be compensated by the State to the extent of pecuniary and limited non-pecuniary injuries suffered by them as a result of such delay.

§ 2. *Definitions*

a. *De minimis standard*—a reasonable maximum interval of time from date of arrest to date of trial expressed in days, fixed by law, and varying according to specific offenses and pre-trial disposition of de-

78 *See* all jurisdictions except California, Maryland and Germany, C.V.C. Chart, *supra* in text.
79 *See* California statute, C.V.C. Chart, *supra* in text.
80 *See* Federal Bill, C.V.C. Chart, *supra* in text.
81 *See* Maryland statute, C.V.C. Chart, *supra* in text.
82 *See* French statute, E.C.C. Chart, *supra* in text.
83 *See* German statute, P.D.C. Chart, *supra* in text. This last provision would give the court some latitude and discretionary power where the making of an award would directly conflict with public interest. For example, suppose the damages claimed were for wages lost in the operation of a house of ill repute—which activity was against the law. The court should rightly be permitted to deny such a claim.

fendants (detention, bail, or release on recognizance). A schedule of standards appears in the appendix to this Act.[84]

b. *Effective delay*—measure of delay computed in days, attributable to the government. It is calculated by subtracting the amount of delay (in days) attributable to the defendant or to exceptional circumstances from the total amount of delay (in days).

c. *Exceptional circumstances*—unique, non-recurring events which produce an inordinate number of cases for court disposition.[85]

d. *Date of arrest*—the date on which law enforcement authorities substantially restrain the liberty of the defendant—usually the date on which the defendant is taken into custody for the first time. In cases where the defendant is not actually taken into custody, for purposes of this Act, the date of arrest shall be the date of formal charge.

e. *Scheduled offense*—a misdemeanor or felony appearing in the list of offenses to which de minimis standards have been applied.

f. *Excessive delay*—a measure of delay (in days) which is the positive mathematical result of subtracting the de minimis standard from the measure of effective delay for a particular defendant.

g. *Claimant*—an individual determined by a court or jury to be innocent, the effective delay of whose trial exceeds the appropriate de minimis standard, or an individual qualifying under § 3 of this Act.

h. *Innocent*—determination beyond a reasonable doubt by the court or by a jury in a special verdict that either: (1) the offense of which the defendant was accused had not been committed, or (2) if committed was not committed by the defendant, and (3) that in any case under (1) and (2), the defendant neither intentionally nor negligently contributed to the bringing about of his arrest.

i. *Indemnity*—compensation paid to the claimant by the State for pecuniary and limited non-pecuniary injuries suffered.

§ 3. *Eligibility*

a. Any individual who has been found innocent of a scheduled offense and whose effective delay of trial exceeds the de minimis standard fixed for that offense, shall be eligible to bring a claim for indemnity against the government.

b. Any surviving dependent of an individual qualifying under § 3a

84 Although such appendix is not actually contained in the Model Bill Outline, it might follow the format below:

| Offense | De Minimis Standard (in days) Detention | Bail |
|---|---|---|
| Murder | 100 | 120 |
| Robbery | 80 | 100 |
| Assault | 70 | 90 |
| etc. | etc. | etc. |

Note that the figures used here are purely fictitious.

85 The type of circumstance envisioned here is the possibility of a large-scale riot or mass public disorder which would cause severe docket congestion. *See* ABA TRIAL STANDARDS, *supra* note 26, at 28.

or §§3c through 3f of this Act shall also be eligible to bring such claim.

c. Any individual whose case has been dismissed and excessive delay can be shown to exist, upon a showing of a lack of probable cause for his arrest or of an arrest brought about by fraudulent means, shall be entitled to bring a claim for indemnity against the government. [This provision is applicable to states in which no absolute discharge rule exists.]

d. Any individual who is discharged absolutely when the effective delay of his trial exceeds or coincides with the de minimis standard may opt for trial. Upon subsequent determination of innocence, such individual shall be entitled to bring a claim for indemnity against the government, if he is otherwise qualified under this Act.[86]

e. Any individual who is serving a prison term for another offense shall not, for that reason alone, be prevented from taking advantage of the provisions of this Act.

f. Any individual, otherwise eligible, who was committed to a State institution for cure or care subsequent to his arrest shall be entitled to bring a claim for indemnity, but his recovery of damages under this Act shall be subject to a reduction equal to reasonable costs incurred by the State for his cure or care.

g. All claims must be brought within [ ] months of the date of determination of innocence, date of dismissal, or date of discharge in the appropriate case.

h. Specific Exceptions:

(1) No claim may be advanced in any case where the individual himself contributed intentionally or negligently to the bringing about of his own arrest.

(2) No claim exists where a claimant, directly or indirectly, has intentionally, fraudulently, or otherwise frustrated the government's orderly and expeditious prosecution of his case.

§ 4. *Proof and Procedure*

a. The claim of an eligible individual shall be heard by the Court of Claims:

(1) if he was found to be innocent by special verdict at his trial, or

(2) upon qualifying under § 3 of this Act, or

(3) if he was convicted at the trial level and the judgment was either reversed on appeal or remanded to the trial court with a subsequent finding of innocence.

b. In the event that the claimant can introduce evidence to show: (1) the existence of a de minimis standard for his particular offense and pre-trial disposition and (2) that the measure of effective delay of his trial exceeded the de minimis standard, the government, in order to

86 This provision has been included for the benefit of those states which might desire to retain the absolute discharge mechanism for specifically designated crimes.

rebut the presumption of liability, must prove beyond a reasonable doubt that the claim is unfounded.

c. The Attorney General or his representative, with the permission of the court, may be present and offer any evidence in opposition to the claim.

d. When the judgment on the claim is final and upon the request of the claimant, the court of claims is hereby authorized to issue press releases publicizing the finding of innocence and the resulting indemnity award.

e. In addition to its normal right of prosecution, the government shall be subrogated to the right of action of any successful claimant as against any person who intentionally or fraudulently brought about the claimant's arrest.

§ 5. *Damages*

a. Once government liability has been determined in a particular case, the claimant shall then be required to prove on a civil standard, the measure of damages to which he is entitled.

b. Damages compensable under this Act are as follows:

(1) Pecuniary injuries

(a) lost wages

(b) expense of litigation

(c) other out-of-pocket expenses

(2) Non-pecuniary injuries. Damages for such injuries shall be awarded on the basis of a graduated scale in proportion to the nature of the crime of which the claimant was charged and to the measure of excessive delay occurring in a particular case. A graduated award scale is contained in the appendix to this Act.[87]

c. The Court of Claims shall reduce claimant's recovery by amounts of compensation received by him from other sources and also by amounts the government has already expended on his behalf beyond ordinary maintenance costs, such as the cost of cure or care.

d. The maximum amount of damages which may be awarded to any claimant is [ ]. Either the claimant or the government may

87 Again, though such appendix is not actually contained in the Model Bill Outline, it might take the following form:

| Offense | Pretrial Disposition | De Minimis Standard (in days) | Effective Delay (in days) | Maximum Excessive Delay (in days) | Award |
|---|---|---|---|---|---|
| Murder | Bail | 120 | 120-130 | 10 | $200 |
| | | | 131-140 | 20 | $400 |
| | | | 141-150 | 30 | $600 |
| | | | 151-160 | 40 | $800 |
| | | | 161-170 | 50 | $1000 |

Note that the figures used here are entirely arbitrary. For crimes other than murder, the award factor would be a lesser quantity. The factor used above for illustrative purposes is twenty dollars.

appeal the decision on the amount of damages to the next higher court.

e. Where an award of damages to a particular claimant would be contrary to public interest, that is, where the damages claimed were actually wages or income lost in the conduct of an illegal activity, the court shall decline to make such award.

§ 6. *Financing.* A trial delay indemnity fund shall be established and subsequently financed by fines and awards obtained pursuant to § 4e of this Act. In addition, fines imposed on all offenses, with the exception of [ ] shall be increased by an amount of [ ], and the proceeds shall be deposited in the indemnity fund. The fund shall be open to all contributions both public and private.

## VI. Conclusion

Although many of the operational questions associated with a trial delay indemnity scheme have been considered in the foregoing discussion, several others await legislative examination. For instance, one prime area of concern not treated in the Model Bill Outline is the delegation of the responsibility for bookkeeping—that is, the keeping of records reflecting, objectively, which part of the delay is attributable to the defendant himself and which part, to the government or to exceptional circumstances. Another matter not fully addressed is the problem of the determination of innocence for compensation purposes when the defendant's case has been reversed *without* remand on appeal. Additionally, there are several measures in the Outline which would be simply unadaptable by many states, such as the provision designating the court of claims as a reviewing body. Some states might wish to appoint a special body to hear TDI claims or to delegate the function to some other special court.

Admittedly, a defendant's eligibility under the Outline is narrowly defined—particularly as pertains to the requirement of a finding of innocence. This requirement has been incorporated into the bill to ensure against the possibility of a guilty person being indemnified. Some might argue that eligibility should be expanded to include the generally acquitted defendant[88] and even the guilty

88 "Generally acquitted" in this context signifies acquitted at trial on the merits of the case, i.e., without a requirement for a determination of "innocence," a term defined *supra,* § 2h Model Bill Outline.

A system expanded to compensate the generally acquitted as well as the guilty (see note 89, *infra*) might carry with it a collateral and unbargained for advantage, which might be aptly termed "reverse bail." The purpose, of course, of ordinary bail is to provide the court with assurance that the liberated accused will be present for his trial. Conversely, with reverse bail, a defendant is provided with a modicum of certainty that his trial will be held by a certain date, after which—if the delay has been government-caused—the defendant, whether convicted or acquitted, is eligible for compensation for provable damages. Without reverse bail, i.e., without a TDI system which compensates the convicted as well as the acquitted, the tendency is for a guilty accused to delay his trial as long as possible, which in turn makes the prospect of jumping bail considerably more enticing. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 268 (1970). Under an indemnity system compensating both guilty and innocent defendants, even the most bail-jump prone criminal might be induced to be present for his trial, or at least in the vicinity, when his trial date would come due.

defendant,[89] since the basis for compensation under the bill is a violation of the sixth amendment right to a speedy trial. Each of these suggestions has merit, but the latter one appears to be highly idealistic in view of the criminal's generally strained relationship with the society which he has offended.

Finally, it is submitted that, aside from the humanitarian aspect of its re-establishing the innocent defendant in his prearrest position, a TDI mechanism provides an absolutely essential component in the general overhaul of the judiciary. In the federal jurisdiction and in the state jurisdictions which have already implemented plans to compensate the erroneously convicted, such statutes could easily be expanded to encompass the notion of indemnity for the dilatorily acquitted (on a finding of innocence). The remaining states would have to consider the propriety of a compensation device as their schemes for improving their judicial administration come to fruition.

Voltaire may have been ahead of his time in suggesting that innocent defendants should be compensated by the State for pretrial injustice, but in the computer and space age where perfection and sophistication are sought in practically every commercial, industrial, and governmental endeavor, perhaps we would not be ahead of our time in attempting to perfect our criminal justice system and to insure it against malfunction.

*John W. Cooley*

89 Proponents of such an argument might ask: "Does not the right to a speedy trial apply to all defendants, whether guilty or innocent?"; "May not a guilty defendant whose trial has been delayed—say for two or three years—suffer exactly the same damages as an innocent defendant?"; "Should not the guilty person also be entitled to compensation for provable damages?"

The writer concedes that there is a possibility that a guilty person should be eligible for compensation but only in narrowly defined circumstances. For example, if the trial of a person is excessively delayed and he is subsequently found guilty, he should possibly be entitled to compensation after an appellate reversal which is based upon the existence of actual prejudice brought about by the excessive delay (i.e., failure of memories, absence or death of defense witnesses, etc.). In other cases, however, the writer feels that the guilty person assumes the risk of possible consequences connected with the crime when he perpetrates it, and therefore should not be compensated for damages suffered. Furthermore, it should be pointed out that a system providing for the compensation of the guilty might possibly encourage considerably more not guilty pleas, thereby contributing to docket congestion.

Finally, in order to circumvent possible charges of denial of equal protection, states adopting TDI legislation could conceivably incorporate a provision which would authorize judges to diminish proportionately the *sentences* of guilty persons whose trials have been excessively delayed.